

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MALAIKA ADAN, *et al.*,

Plaintiffs,

v.

CITY OF HOUSTON AND
METROPOLITAN TRANSIT
AUTHORITY OF HARRIS COUNTY,
Defendants.

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CIVIL ACTION NO. H-04-3006

MEMORANDUM & RECOMMENDATION

Defendant City of Houston has filed a motion (Dkt. 71) seeking to dismiss Deborah Boudreaux's claims with prejudice pursuant to Federal Rule of Civil Procedure 41 because she has failed to diligently prosecute her claims by not appearing for a deposition.

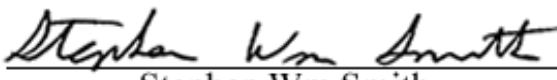
Boudreaux has responded that she was hospitalized for an extended period of time and was out of contact with counsel. She asserts that she does desire to pursue this case and represents that she will appear for a deposition at a mutually agreeable time.

Involuntary dismissal with prejudice pursuant to Rule 41(b) is a harsh sanction. The court should exercise its discretion to dismiss claims only where there is a clear

pattern of delay and lesser sanctions would be futile. *Berry v. Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992). Here, it does appear that Boudreaux has repeatedly failed to appear for a deposition. However, the court accepts Boudreaux's explanation that she was hospitalized and out of touch with counsel. There is still sufficient time left in the discovery period for Boudreaux to correct any prejudice to defendant by appearing for and cooperating in a deposition. Therefore, the court recommends that defendant's motion to dismiss pursuant to Rule 41 be denied without prejudice to refiling if Boudreaux continues to avoid her discovery obligations.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on December 16, 2005.


Stephen Wm Smith
United States Magistrate Judge